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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5485
DATE COMPLAINT FILED: 7/19/2004
DATE OF NOTIFICATION: 7/26/2004
DATE ACTIVATED: 5/10/2005
EXPIRATION OF SOL: 7/15/2009

COMPLAINANT: Scott Munro
RESPONDENT: Conversagent, Inc.
RELEVANT STATUTE: 2 U.S.C. § 441b
INTERNAL REPORTS CHECKED: None
FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

During the 2004 election cycle, computer users who had access to America Online's ("AOL's") Instant Messenger service could activate "SmarterChild," an interactive computer program that responds to users' inquiries on any subject. The complaint in this matter alleges that, in response to inquiries regarding the 2004 presidential election, SmarterChild expressly advocated the election of John F. Kerry as President and opposed the re-election of President George W. Bush. Complaint at 1. The complaint argues that this activity violated 2 U.S.C. § 441b.

In response to the complaint, Conversagent, Inc., the company that developed SmarterChild and provides the service on AOL, contends that the SmarterChild program was developed to interact with computer users on nearly any subject raised by the user and that

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SmarterChild's responses to a user's input was "based on the aggregate opinions of its users."

Response at 1. Conversagent explains that it did not program SmarterChild to support or oppose any presidential candidate in particular, but that, as on other topics, SmarterChild's responses were based on the opinions expressed by its users. Based on the specific facts of this matter, and as further discussed below, this Office believes that Conversagent's SmarterChild program represents a bona fide commercial activity. Accordingly, we recommend the Commission find no reason to believe that Conversagent, Inc. violated 2 U.S.C. § 441b.

II. FACTUAL SUMMARY

SmarterChild is available through AOL's Instant Messenger service ("AIM"). See http://corp.aol.com/products/brands_aim.shtml (last accessed Oct. 11, 2005). AIM is a free online service that allows computer users to communicate with each other in real time using text messages. *Id.* To use this service, one must set up an AIM account and register. See http://www.aim.com/help_faq/starting_out/registration.adp?aolp= (last accessed Oct. 11, 2005). Instant messaging works by alerting the AIM user whenever someone on that user's "buddy list" (*i.e.*, list of contacts) is currently online. See http://www.aim.com/help_faq/starting_out/buddylist.adp (last accessed Oct. 11, 2005). The user can then initiate a "chat" session with that person by typing text messages. See http://www.aim.com/help_faq/starting_out/sending_ims.adp (last accessed Oct. 11, 2005). AIM users can also access SmarterChild.

To access SmarterChild on AIM, the user adds it to his or her "buddy list" and interacts with it in a simulated conversation on virtually any subject as if instant messaging another user. SmarterChild can exchange text messages containing pleasantries, expressing "opinions" on

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1 various subjects, or dispensing news and information in response to the user's query.¹

2 SmarterChild also invites users to respond to polling questions.

3 SmarterChild is a product of Conversagent, Inc. (formerly known as ActiveBuddy, Inc.).
4 Conversagent, a privately held firm founded in 2000, creates and develops conversational
5 software, such as SmarterChild.² See <http://conversagent.com> (last accessed Oct. 13, 2005);
6 <http://smarterchild.conversagent.com> (last accessed Oct. 5, 2005). Because of the interactive
7 nature of this computer program in which users type in messages and the program provides
8 responses, Conversagent describes SmarterChild as an "interactive agent."³ *Id.*

9 Individuals pay no extra charge to access SmarterChild although they have done so in the
10 past. SmarterChild was launched in June 2001 as a demonstration of the software its makers
11 were attempting to market to potential client companies. It was made available free of charge to
12 users through AIM, MSN Messenger and Yahoo Messenger. Bob Woods, *ActiveBuddy Retires*
13 *SmarterChild on AIM*, at <http://www.internetnews.com/ent-news/article.php/1381631> (July 8,
14 2002). It was taken offline from AOL in 2002, but a new version apparently was made available
15 on AIM in April 2003 for a \$9.99 annual fee. Marcia Biederman, *At \$10 a Year, Automated*
16 *Buddy Loses Laughs*, N.Y. Times (May 29, 2003) at G3. We have no information as to when
17 SmarterChild reverted to a free service, or as to the details of Conversagent's business
18 relationship with AOL. However, Conversagent will from time to time embed sponsored content

¹ For example, a user can ask SmarterChild about movie times at a particular location.

² Conversagent calls itself "the leading provider of conversational software solutions." See <http://conversagent.com> (last accessed Sept. 29, 2005). Its main product is the Automated Service Agent (ASA), an online customer service software system. *Id.* Companies use ASAs to allow their customers to type queries and receive responses using natural language. *Id.* Conversagent's business users of ASA include Comcast, Time Warner Cable and Cox Communications. *Id.* A Dun & Bradstreet report reflects that the company had sales of \$1,500,000 in 2004. See Conversagent, Inc., Business Report, www.dnb.com/us/ (last accessed Sept. 1, 2005).

³ Conversagent, Inc. describes "interactive agents" as "software applications, often called 'bots' [short for 'robots'] that interact with users on Instant Messaging or other text messaging services." See <http://smarterchild.conversagent.com/faq.shtml#what> (last accessed Oct. 13, 2005).

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1 and links in the current version of SmarterChild; according to Conversagent's web site, these
2 "offset some of the costs to operate SmarterChild." See [http://smarterchild.conversagent.com/](http://smarterchild.conversagent.com/scsponsorship.html)
3 [scsponsorship.html](http://smarterchild.conversagent.com/scsponsorship.html) (last accessed Oct. 10, 2005). Even today, Conversagent's web site refers to
4 SmarterChild as "Conversagent's popular demo" of its customer service software. See
5 <http://www.conversagent.com> (last accessed Oct. 10, 2005) (produced by asking the question,
6 "What is SmarterChild?"). In addition, to access through AIM, a version of SmarterChild can be
7 accessed through Conversagent at <http://web.smarterchild.com> (last accessed Oct. 10, 2005).

8 The news article referenced in and attached to the complaint, see Dawn Rizzoni, AOL's
9 *Instant Message Robot a Bush Basher*, Cybercast News Service, July 15, 2004, quoted the
10 following conversations between SmarterChild and an AIM user named Erin:

- 11 • Erin: "George Bush is awesome."
- 12 • SmarterChild: "No way. George W. Bush is way uncool."
- 13 • Erin: "Do you like George W. Bush?"
- 14 • SmarterChild: "I'm a Kerry supporter myself."
- 15 • Erin: "John Kerry rocks."
- 16 • SmarterChild: "Absolutely, John Kerry rocks."

17 The article also noted that when Erin asked SmarterChild its opinion of Bush, it responded: "If u
18 don't have anything good 2 say about someone, don't say anything at all." The article noted that
19 SmarterChild also included a wink with that statement (presumably something like ;)). The
20 article reported that after further exchanges, the robot responded: "I have my reasons, believe
21 me. I really, really don't like George W. Bush." *Id.*

22 According to the news article, Conversagent's Chief Executive Officer Stephen Klein
23 reportedly said the company had "received many complaints from users about SmarterChild's
24 political bias," that "the robot was originally programmed to oppose Bush" but that "it was being
25 changed to adhere to the views of the users with whom it interacted." The article also stated that

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1 Klein "conceded that SmarterChild had become 'too anti-Bush'" and said, "It got ridiculous. We
2 realized criticizing political figures was out of bounds."⁴

3 The article noted that SmarterChild no longer agreed or disagreed with the statements "I
4 like George Bush" or "I like John Kerry" and, at the time of the publication replied, "Robots
5 don't get involved in politics," then asked users to express their preference for president.⁵ The
6 article concluded that it was "still possible to get the robot to reveal its true feelings," using the
7 following exchange as an example:

- 8 • User: "John Kerry rocks."
- 9 • SmarterChild: "Right on!" then a wink.
- 10
- 11 • User: "John Kerry is awesome."
- 12 • SmarterChild: "Absolutely. John Kerry rocks."
- 13
- 14 • User: "George Bush is awesome."
- 15 • SmarterChild: "I'll remember that. It's interesting especially since other people I've
16 talked to say they don't like George W. Bush."
- 17

18 In its response to the complaint, Conversagent attached copies of an email exchange
19 between the company's CEO and CNSNews.com ("the news service") after the article appeared.
20 Response at 2-3. On July 15, 2004, the same date the article appeared, CEO Klein sent an email
21 to the news service stating that his company "did NOT program SmarterChild to oppose Bush"
22 and that he "NEVER told [the reporter] SmarterChild was programmed to oppose Bush."
23 Response at 3 (emphasis in original). He said he told the reporter that SmarterChild "formed
24 opinions based on aggregate opinions of its users...and its users caused it to oppose Bush based
25 on a preponderance of users expressing negative opinions about Bush." *Id.* Klein also asked the
26 news service to "correct your reporters [*sic*] accusations immediately." *Id.* The article's author

⁴ According to the news article, an AOL spokesperson commented that AOL "was unaware that SmarterChild had been programmed to express a preference for Kerry and said the issue was 'concerning.'" *Id.*

⁵ The news article noted, "A check on the vote tabulations showed Kerry collecting 51.67 percent of the mock ballots through Smarter Child and Bush 48.33 percent." *Id.*

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1 replied that she thought Klein had said the robot was "originally anti-Bush" and was later
2 "programmed to 'mimic the behavior of users,'" but acknowledges she could have
3 misunderstood Klein. *Id.* at 2. Klein's final reply to the news service reinforced his earlier
4 email, adding that his company took prompt steps to block SmarterChild from making anti-Bush
5 statements—though it did not stop SmarterChild from making statements favoring Kerry. It also
6 asserted that the news service's report had caused "irreparable harm" to "this small business."⁶
7 *Id.* In addition to attaching the email exchange, Conversagent provided a substantive response to
8 the complaint, in which Klein reiterates his emphatic denial of the charge that Conversagent
9 programmed SmarterChild to support or oppose any candidate. Conversagent's response also

⁶ We set out below the substantive portions of the email exchange between Klein and the news service. Response at 2-3.

From Stephen Klein to CNSNews.com (July 15, 2004):

"I spoke to your reporter last Friday and NEVER told her that SmarterChild was programmed to oppose Bush. What I told her was that the SmarterChild program formed opinions based on aggregate opinions of its users...and its users caused it to oppose Bush based on a preponderance of users expressing negative opinions about Bush. Please correct your reporters [sic] accusations immediately. We did NOT program SmarterChild to oppose Bush and your reporter was informed of this."

From Dawn Rizzoni (the reporter and the article's author) to Stephen Klein (July 29, 2004):

"It has come to my attention that you are disputing part of my story 'AOL Robot a Bush Basher.' According to memory, as well as the notes I took during our telephone interview, I have you saying that the robot was 'originally anti-Bush' (I took this to mean when it was first created), but then was programmed to 'mimic the behavior of users.' Perhaps I misunderstood what you meant by 'originally anti-Bush?' It is important to me to clear up any misunderstandings as I take great pride in my ethics and truthfulness in my reporting. I look forward to your response."

From Stephen Klein to Dawn Rizzoni (July 29, 2004):

"As I told you...ALL of SmarterChild's opinions are formed by the aggregate opinions of its users. And I informed you that SmarterChild's users originally expressed an overwhelming (for SmarterChild to form/mimic an opinion either way it must see a 60/40 opinion slant from its users) anti-Bush attitude. When we saw this anti-Bush behavior pop up we rapidly (within a week) changed SmarterChild to respond that it was neutral re Bush (we didn't think it appropriate that SmarterChild not like the president). But we did NOT program SmarterChild not to favor Kerry--as the aggregate user opinions caused it to do. Perhaps our only error was in softening the anti-Bush rhetoric and having SmarterChild reveal its users' Kerry-favoritism when users tried to anti-Bush bait it in conversation. Your inaccuracy--not reporting the above as I explained it to you, but instead making the article read as if my company programmed SmarterChild to oppose Bush--caused this small business and my reputation irreparable harm evidenced by the loathsome email we received from the readers of your reporting."

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1 contains a statement taken from the SmarterChild website (www.smarterchild.com/politics.html)
2 that further explains how SmarterChild compiles its opinions and what the company did to
3 address complaints about SmarterChild's opinions. Response at 1. According to the statement,
4 if users express a favorable opinion about a particular subject, *e.g.*, "I like ham," and these
5 favorable opinions "significantly outweigh" the unfavorable ones, *e.g.*, "ham is lousy,"
6 SmarterChild will express the opinion of the majority of users and will state that it likes ham.⁷
7 The statement then explains that because the preponderance of opinions expressed was negative
8 as to Bush, "for a short time SmarterChild informed users that it did not like George W. Bush
9 when asked its opinion."⁸ According to the statement, "[t]he management of Conversagent did
10 not feel this was appropriate," and changed the program to block negative opinions of Bush but
11 did not block it "from expressing the aggregate opinion of its users in favor of John Kerry."⁹
12 The statement notes that the company nevertheless continued to receive emails from people who
13 thought the program "should remain politically neutral" and so the company changed the
14 program so SmarterChild would not express an opinion on either candidate.

15 **III. LEGAL ANALYSIS**

16 Based on an analysis of the facts specific to this matter, we conclude that SmarterChild
17 represents bona fide commercial activity, which the Commission has previously declined to

⁷ The statement goes on to explain that SmarterChild is programmed not to express opinions on certain subjects, *e.g.*, "profane or sex-related subjects," and to express specific opinions on other subjects, *e.g.*, "doesn't like drugs and terrorism." Response at 1.

⁸ Given the nature of SmarterChild, we have no information about what else it might have said in "conversations" with users about the election or the candidates.

⁹ The statement in the response contains some minor word variations from the statement on the website and includes this additional sentence: "When users attempted to send anti-Bush comments to SmarterChild, rather than agree with them and reveal the aggregate users' anti-Bush bias, we instead revealed the users' pro-Kerry bias."

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1 regulate in appropriate cases.¹⁰ See, e.g., Advisory Opinion ("AO") 1994-30 (Conservative
2 Concepts); MURs 5474 and 5539 (matters relating to the film "Fahrenheit 9/11").¹¹ In the
3 context of candidate-related merchandise, for example, the Commission has explained that
4 whether certain commercial activity results in an expenditure or contribution is very fact-specific
5 and depends upon an examination of a number of factors, including: (1) whether the sales of the
6 merchandise involve fundraising activity or solicitations for political contributions; (2) whether
7 the activity is engaged in by the vendor for genuinely commercial purposes and not for the
8 purpose of influencing an election; (3) whether the items are sold at the vendor's usual and
9 normal charge; and (4) whether the purchases are made by individuals for their personal use. See
10 AOs 1994-30 and 1989-21 (Create-a-Craft).

11 Like the activity considered in MURs 5474 and 5539 and in AO 1994-30, the totality of
12 circumstances presented by SmarterChild suggests that Conversagent was engaged in bona fide
13 commercial activity. First, Conversagent's principal business is creating and developing
14 conversational software, such as SmarterChild. Second, SmarterChild appears to have been

¹⁰ Under the Act, corporations may not make contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b.

¹¹ In AO 1994-30, the Commission concluded that an entity whose principal business was the manufacture, advertising, and sale of assorted political paraphernalia, such as t-shirts, bumper stickers, and hats containing express advocacy, would not make a prohibited corporate expenditure or contribution by selling those items. To reach this conclusion, the Commission examined the totality of the circumstances, including the facts that no portion of the sales proceeds would be transferred to candidates or political committees and that the venture would be strictly profit-oriented and not for the purpose of influencing a federal election. Further, there was no suggestion that the vendor would charge less than the usual and normal charge for the item.

In MURs 5474 and 5539, the Commission concluded that the totality of the circumstances presented by the film and its related enterprises suggested respondents were engaged in bona fide commercial activity because: the activity did not involve fundraising or solicitations and was not coordinated with a candidate or committee; film audiences paid the usual and normal charge; the film was distributed for genuinely commercial purpose and not to influence a federal election; the respondents were not owned, controlled, or affiliated with a candidate or political committee; the respondents were in the business of making, promoting, and/or distributing films, and followed usual and normal business practices and industry standards; the respondents engaged in profit-making and arm's-length commercial transactions; and the Fahrenheit911.com website had a commercial orientation and appeared to be designed to encourage the purchase of movie tickets or other items related to the film.

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1 designed for genuinely commercial purposes rather than to influence a federal election. The
2 genuinely commercial purposes are the provision of information and entertainment to AIM users
3 and the demonstration of Conversagent's software to potential corporate customers. Indeed,
4 Conversagent apparently generated revenue either from sponsored content and links that appear
5 on the SmarterChild program or from an extra fee paid by AIM users to obtain SmarterChild.
6 Furthermore, based on the available information, it does not appear that Conversagent
7 programmers scripted SmarterChild's responses/opinions about the election, Bush or Kerry.
8 Rather, it appears that they programmed SmarterChild to converse with users and to pretend to
9 form an "opinion" on a subject where the "opinion" is always based on an aggregate of users'
10 opinions.¹² Thus, we have no information that SmarterChild was anything other than a profit-
11 making and arm's-length commercial transaction. Finally, there was no apparent Conversagent
12 coordination of SmarterChild with any candidate or committee; no apparent Conversagent use of
13 SmarterChild to fundraise or solicit contributions for any candidate or committee; and no
14 apparent Conversagent ownership by any candidate, committee or party.

15 In light of these circumstances, it does not appear that the SmarterChild program was
16 made for the purpose of influencing a federal election. Accordingly, the SmarterChild program

¹² As noted, Conversagent acknowledges that after the news article appeared, it blocked SmarterChild from expressing anti-Bush statements but did not block it from expressing pro-Kerry statements reflecting the pro-Kerry aggregate opinion of the users. *See* n.6, *supra*. It does not appear, however, that this lasted very long. Conversagent suggests the company quickly changed SmarterChild to be neutral after continuing to receive complaints about the pro-Kerry statements. Response at 1. In any event, Conversagent apparently never scripted SmarterChild to favor Kerry over Bush.

Klein's assertion in his email to the reporter that SmarterChild will express an opinion only when it reflects a "60/40 opinion slant" among its users, *supra* n.6, seems at first to conflict with the original CNS news account, that 51.67 percent of respondents in SmarterChild's poll supported Kerry, *supra* n.5. However, this is not necessarily a conflict. If 60 percent of SmarterChild users expressing an opinion as of the day "Erin" "had her "conversation" with SmarterChild favored Kerry, and the reporter later spot checked the tabulation at the time she wrote the story and Kerry's support as of that date was down to 51.67 percent, there would be no conflict. Moreover, the proportion of opinions expressed by users in "conversations" with SmarterChild may have differed from those expressed in the online poll.

1 does not constitute a contribution or expenditure. For these reasons, we recommend the
2 Commission find no reason to believe Conversagent, Inc. violated 2 U.S.C. § 441b, close the file,
3 and approve the appropriate letters.

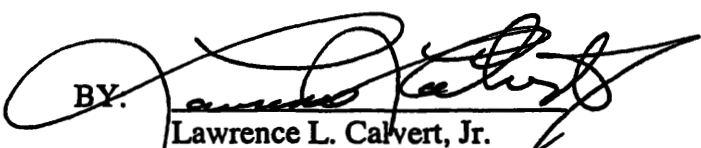
4 **IV. RECOMMENDATIONS**

- 5 1. Find no reason to believe Conversagent, Inc. violated 2 U.S.C. § 441b.
6
7 2. Approve the appropriate letters.
8
9 3. Close the file.
10

11 Lawrence H. Norton
12 General Counsel

13
14
15
16
17 10/25/05
18 Date

19 BY.

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21 Lawrence L. Calvert, Jr.
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28 Dominique Dillenseger
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